No. 4096

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LEE HING, also known as LEE GOOD MING,

Appellant,

vs.

JOHN D. NAGLE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

APPELLEE'S REPLY BRIEF

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STATEMENT OF FACTS.

We adopt the statement of facts preceding the opinion rendered by the Honorable United States District Judge Van Fleet in the above-entitled case; they are as follows:

> "Lee Soo, admittedly born in China, applied for admission at the port of San Francisco, as a son of one Lee Hing, also known as Lee Good Ming, alleged to be a native-born citizen of the United States, in the right given such an applicant by Sec. 1993, R. S. His application was

denied by the Immigration Authorities and upon appeal to the Secretary of Labor the decision of the Board of Special Inquiry was affirmed and the appeal dismissed. Thereupon the present petition for *habeas corpus* to release the applicant from custody by the Immigration Authorities, in which he is held, was filed in his behalf. The petition is very general, consisting largely of allegations of conclusions, but by stipulation in open court the entire immigration records and files involved in the application were introduced as an amendment and supplement to the petition to which petition, as thus amended, the Government has demurred generally upon the ground that it presents no case in law or fact warranting the issuance of the writ.

The finding against the petitioner was based upon the conclusion reached by the Immigration Authorities that petitioner had failed to sustain the burden resting upon him of establishing the facts which would fix his status as that of a citizen of the United States under Section 1993 aforesaid; that is, while the Government did not seek to controvert the alleged fact that petitioner was the son of the Lee Hing above described the conclusion was reached that the evidence was insufficient to show that the latter was as claimed a native-born citizen of the United States and that consequently the rights assumed by petitioner as resulting from his relationship to the latter must fall to the ground. This conclusion resulted from the disclosure of the immigration records, made a part of the petition, that petitioner's alleged father had gotten his lines crossed and tangled up with

another Lee Hing, also claiming to be a native-born citizen, in a manner to render it doubtful which of the two, if either, was such citizen, the claim of both being based partly at least on the same records.

The facts briefly stated are these: Petitioner's alleged father, on October 5, 1904, made an affidavit (XB, P5) setting forth that he was born in San Francisco in 1876 and was thereafter taken to China by his father in 1882, where he remained until 1899, when he returned to the United States on the SS. 'Belgic,' holding ticket No. 162, and on March 2, 1899, was duly landed as a native by the then Collector of Customs. This affidavit bore an endorsement showing that the affiant thereafter, on October 13, 1904, departed from the United States on the SS. 'Mongolia,' and attached to the record was an affidavit of one Henry C. Dibble, an attorney (XB, P4), to the effect that the person in whose behalf it was made was the same Lee Hing, who was No. 162, returning on SS. 'Belgic,' November, 1898—who affiant claims he represented at that time. This Lee Hing returned to this country on the SS. 'Manchuria'' 3, 1906 (XB, P3), and was landed the following day by the then Commissioner. On this latter occasion one Inspector Gassaway, on May 13, 1906, made a report to the inspector in charge of the Chinese Bureau that: 'In re case of Lee Hing, No. 64—''Manchuria,'' May 13, 1906. I have compared the enclosed photograph with that in file in his previous landing and find them to be one and the same person.' It appears, however, from a comparison of the photograph

of this Lee Hing, appearing at page 5 of Exhibit 'B,' that the pohtograph attached to pages 5 and 12 of Exhibit 'C' (being the photograph of the person previously admitted as No. 162 on the SS. 'Belgic') was quite evidently that of a wholly different person. It further appeared that Lee Hing, the alleged father of the petitioner, subsequently made an application on October 21, 1912 (XB, P24), to the Commissioner of Immgiration at Boston, Massachusetts, for a Native's Return Certificate, Form 430, which was thereafter granted by the Commissioner of Immigration at Seattle, Washington, November 8, 1912, and that he departed from the latter port on the SS. 'Minnesota,' December 16, 1912; that he thereafter returned through the port of San Francisco on the SS. 'Mongolia,' June 1, 1915, and was admitted as a returning citizen (XB, P25), his photograph as he appeared at the latter date, appearing at page 26, Exhibit 'B.' But the record also discloses that on April 1, 1912, another Lee Hing (known also as Lee Ging Sing) made an application to the Commissioner at San Francisco for a Native's Return Certificate, Form 430 (XC, P35), which was granted and he departed for China on the SS. 'Mongolia,' April 10, 1912. He returned on the SS. 'Mongolia' April 22, 1913, and was duly admitted on his certificate, as a native (XC, P36). This latter Lee Hing claimed to be the Lee Hing who had been admitted as No. 162 on the 'Belgic,' November, 1918; and comparison of the photograph appearing on pages 5 and 12 of Exhibit 'C' with that appearing on the application for a return certificate, (XC, P35), and the photograph ap-

pearing at page 37 of the same record tends strongly to confirm the correctness of his claim that he was the Lee Hing who was previously admitted as a native on March 2, 1899, by the then Collector of Customs.

From these facts it was deduced and found by the Board of Special Inquiry that this last-mentioned record of 1898 did not refer to the father of the petitioner and it was accordingly found by them that the record did not sustain petitioner's contention as to the fact of his father's citizenship and the judgment of exclusion followed." (Transcript, P. 14-18.)

Other facts necessary to consider are as follows:

Lee Hing identifies both photographs contained in the 1899 record found in Ex. C, p. 5 and 12 (enlarged photograph No. 1), Deportation file Ex. A, p. 13 and p. 80, and also the photograph accompanying affidavit of October 5, 1904, found in Ex. B, p. 5, enlarged photograph No. 3, as true photographs of himself. Deportation file Ex. A, p. 14 and 80. This identification, therefore, precludes all possible claim by appellant that the photographs in the record of the Lee Hing landed from the steamer Belgic in 1899, were altered or changed. It is also apparent from an examination of the photographs alleged to be photographs of the same person taken five years apart that under no possibility could the two photographs represent one and the same person, and the claim of the applicant's father, Lee Hing, to the 1898 record by his own testimony falls to the ground.

An additional circumstance which from the testimony of Lee Hing disproves his claim to the 1898 record is found in this that Lee Hing claims to have been married in 1898, Deportation file Ex. A, p. 80, and claims to have been at that time the father of an infant boy, Admission file Ex. A, p. 17; whereas the 1898 applicant testified at the time of his admission that he was not married. Ex. E, p. 16 and Ex. C, p. 25. The present Lee Hing on being questioned with reference to the statement last above referred to, found in the 1898 record, replied: "I was married then. I don't know what I said before." Deportation file Ex. A, p. 81.

A further material discrepancy is found in the fact that the Lee Hing landed in 1898 testified that his father was somewhere in the interior of the United States. Ex. C, p. 24, whereas the present Lee Hing claims that his father died in China in K.S. 17 or 18 (which would be prior to the arrival of Lee Hing in 1898, K.S. 24) Deportation file Ex. A, p. 79.

Much reliance is placed upon the finding of Assistant Secretary of Labor Post in the deportation case against Lee Hing, the father of claimant for admission, which finding is in the following language:

"DEPARTMENT OF LABOR
Office of the Assistant Secretary
Washington.

53947-22 August 3, 1916.

In re LEE YOOK MING and LEE GEN SING, both claiming to be Lee Hing, who was admitted as a citizen in 1898-99.

Memorandum for THE COMMISSIONER GENERAL:

Upon review of all the Bureau and Departmental memoranda in these cases, I regard the claims of both men as doubtful, but am not satisfied as to either that he is in the United States in violation of law. The Bureau's recommendation as to LEE GEN SING in Second Supplemental Memoranda (July 28, 1916), is therefore approved, but the recommendation as to LEE YOOK MING is disapproved.

Although the latter's resemblance to Lee Hing's photo of 1898-99 (No. 1 of the enlarged series) is less as to the ear than LEE GEN SING'S, yet he was identified in 1904 by the attorney for Lee Hing as that identical person. Both defendants cannot be that person, and it is probable that neither is. *Therefore this decision is intended not to bear upon their rights of citizenship, but only upon the disposition of the warrants now outstanding.*

Both warrants are cancelled without prejudice to new warrant proceedings upon satisfactory supplemental proof, nor to exclusion decisions upon the application of either or of any

person claiming under either, to enter the country at any port at any time.

LOUIS F. POST,
Assistant Secretary."

Deportation file, Ex. A, p. 166..

It appears, therefore, that the finding was expressly not an adjudication of the present Lee Hing's right to the 1899 record and was not an affirmation of his citizenship status, as counsel in their brief state. Appellant's brief, pages 9, 17.

As a matter of fact, all the officials passing upon the question of whether or not this Lee Hing was the Lee Hing admitted in 1899, determined the question adversely to him and likewise found unfavorably upon his claim of citizenship. See Boyce's decision, deportation file, Ex. A, p. 1; Commissioner Backus' report, deportation file, Ex. A, p. 15-18; Report for the Commissioner General by A. Warner Parker, deportation file, Ex. A, 21-22; Assistant Commissioner General Hampton's report, deportation file Ex. A, p. 24; Commissioner White's report, deportation file, Ex. A, p. 114 to 117; particularly p. 115 and 114; Assistant Commissioner General's report, deportation file, Ex. A, p. 118 to 120; A. Warner Parker's report for the Commissioner General, deportation file, Ex. A, 163-165; Inspector A. S. Hemstreet's report under date of October 27, 1922; admission file Ex. A, p. 19; Board of Special Inquiry report, admission file Ex. A, 24-26; Commissioner White's report, admission file Ex. A, p.

34; Secretary of Labor's decision admission file Ex. A, 45-49.

Subsequent to the date of the findings of Assistant Secretary Post hereinbefore set out, the present Lee Hing obtained a certificate of identity similar to the certificate appearing in Exhibit Immigration File, subject Lee Som, p. 1. Note that on the face thereof appears after the name, age, occupation, the words "Admitted as" after which is to be filled in the status under which the applicant obtained admission, the immigration file number of his record of admission, the ship from which he landed and the date of his admission. These certificates are issued not by the Secretary of Labor, but by the local office in conformity with Rule 19, Immigration Rules, for the purpose of affording proper and efficient means of identification to Chinese persons, or persons of Chinese descent admitted to the United States.

The certificate of identity puts into the possession of a Chinese person a ready means of connecting himself with the records at the port of admission and is really merely an extension of the landing record. An application therefor may be made at any time after entry, and the fact that the certificate was not issued until a long time thereafter does not indicate that a determination has been made in the case as of the date of issuance; upon a request therefor no investigation is made into the merits of the case and the certificate has no further significance than the copy of the landing record would

have, had the same been handed to the applicant immediately following his admission.

Rule 19 of Rules governing the admission of Chinese is entitled "Certificate of Identity," and subdivision 8 thereof "Value of the Certificate." The language of Subdivision 8 is as follows:

> "The certificate of identity when issued to Chinese of the exempt classes *is granted solely for the protection of such Chinese while residing in the United States* and retaining an exempt status, *and* therefore *will not be accepted as satisfactory evidence in any other connection.* For example, a domiciled exempt holding such certificate of identity will not be excused from a compliance with the terms of subdivision 11 of Rule 15. The certificate may be accepted, however, as evidence of a former admission as of an exempt status and be given such cumulative value as the circumstances of a case justify. When issued to a person of Chinese descent as a United States citizen by birth, the certificate will be accepted at all times thereafter as evidence of the holder's right *to reside in the United States;* extreme caution is to be observed, however, in determining whether the certificate is genuine and in the hands of the person to whom issued; provided, always, that fraud has not been perpetrated upon the Government in securing its issuance."

ARGUMENT.

Appellant's contention revolves itself into this, firstly, that the burden is upon the Government to overcome the effect of the prior admissions of and certificate of identity issued to Lee Hing by evidence which the Court considers competent, and as no new evidence has been offered by the Government that the decision of the Immigration authorities upheld by the lower Court denying applicant admission on the ground that his father is not a citizen, is an abuse of discretion; secondly, that in any event applicant is entitled to have the question of his citizenship determined judicially, rather than by the executive authorities.

Considering these questions in their order, we propose to show, first, that applicant admittedly being a native of China, seeking admission to the United States for the first time, the burden was upon the applicant to establish his right to admission, to-wit, his status as a citizen of the United States; that the previous admissions of his father as a citizen are not res adjudicata and are not determinative of the question of his father's citizenship; that the question of Lee Soy's citizenship is properly determinable by the Immigration authorities.

PROPOSITION I.

THE FINDING OF THE IMMIGRATION AUTHORITIES THAT LEE SOO WAS NOT A CITIZEN AND WAS, THEREFORE, NOT ENTITLED TO ADMISSION AS THE SON OF LEE HING, A LABORER, IS SUSTAINED BY THE EVIDENCE.

The evidence presents an issue of fact as to whether or not the present Lee Hing was the Lee Hing landed in 1899; the answer to this question depends upon whether or not the photographs of the 1899 claimant found in Ex. C at pages 5 and 12 claimed by this Lee Hing to be true likenesses of himself are in fact such. Here is involved a question of identity which is purely a question of fact, which is a question for determination by the Immigration authorities. Mon Singh vs. White, 274 Fed. 513. Chan Tse Ching vs. United States, 189 Fed. 412. Comparing these photographs with the photographs found in Ex. B taken in the years 1904 and 1915, which are admittedly true photographs of the present Lee Hing, it was found by the Immigration authorities and by His Honor, Judge Van Fleet, that the present Lee Hing was not the person whose photograph appears in the 1899 record, and by a glance of the eye it is apparent to anyone that such finding is correct.

In addition to the failure to establish identification from the photographs in the 1899 records, there are as heretofore pointed out, serious conflicts between the testimony of the present Lee Hing and

the testimony given by the Lee Hing landed in 1899, namely as to the fact of marriage in 1898; as to whether the father was dead or alive in 1898 and the fact that the present Lee Hing claimed a son born prior to 1898.

The case in re Wong Toi, 278 Fed. 562, cited by counsel for appellant, page 18 of his brief, was an exclusion case as distinguished from the deportation of a resident Chinese, in which the question involved was, as here, the citizinship of the applicant, and this in turn depended upon the citizenship of his father. The father in that case claimed an habeas corpus record, whereas in this case no habeas corpus or court record of any kind is involved. In that case it is to be noted that the decisions of the Inspectors, the Board and the Department other than the Secretary of Labor were to the effect that the father of the applicant was the one entitled to the record in question, which is not the situation in the instant case. The Court there held that the Immigration Tribunal apparently exacted a higher degree of proof unwarranted in law; that the applicant had been required to establish beyond substantial doubt that his father is a citizen. This was held to be error. *"It was sufficient if the necessary facts were established, by a fair preponderance of evidence."* That burden was met in that case and the District Court admitted the applicant. The necessary facts in the instant case were not established by a fair preponderance of evidence, and, therefore, the Court below sustained the findings of the Secretary of Labor.

It is contended by counsel that the immigration authorities having twice landed Lee Hing as a citizen and having issued a "certificate of identity" in conformity with this finding, are now estopped from attacking this finding.

It is to be borne in mind that the only adjudication by the Secretary of Labor in the case of Lee Hing was in a deportation proceeding as distinguished from an admission proceeding, such as this is, and which adjudication expressly refrained from deciding the question of Lee Hing's citizenship, and more particularly the right or rights of any person or persons claiming thereunder; that the certificate of identity issued to Lee Hing, the father of the applicant for admission, is not an adjudication and has no greater force or effect than the admission of Lee Hing at the time of his entry into the United States [redacted].

The law is well settled that the decisions of administrative officers are not res adjudicata in a technical sense. This has been held in Ex parte Stancampino, 161 Fed. 164; Ex Parte Chin Own, 239 Fed. 391; Pearson vs. Williams, 202 U. S. 281.

The decisions of executive officers not being res adjudicata it must follow that the certificates issued by them evidencing their findings are not the principle of setoppel, if any exists, rests in the finding itself and not in the certificate.

In the case of Lew Quen Wo vs. United States, 184 Fed. 685, this Court held:

> "There is no statutory provision that the decision, if favorable to the applicant for admission, shall be final. The decisions have been to the contrary. United States vs. Lau Sun Ho (D.C.) 85 Fed. 422, and cases there cited; Mar Bing Guey vs. United States (D.C.) 97 Fed. 576."

The other cases cited by counsel,

> *Liu Hop Fong vs. U. S.,* 209 U. S. 453
> *U. S. vs. Hom Lim,* 214 Fed. 456
> *Ex Parte Wong Yee Toon,* 227 Fed. 247
> *Wong Tee Toon vs. Stemp,* 233 Fed. 194
> *Lui Hip Chin vs. Plummer,* 238 Fed. 763

were all cases in which were involved Section 6 certificates as distinguished from certificates of identity with which we are concerned, and each and all were deportation cases as distinguished from exclusion cases. The distinction between exclusion cases and deportation cases will be hereinafter discussed. The distinction between such certificates and the one here involved is sometimes lost sight of. In ex parte Wong Yee Toon, 227 Fed. 247, at page 251 thereof, the distinction is pointed out in the following language:

> "In Pearson vs. Williams, 202 U. S. 281, the same board of special inquiry which admitted the immigrant a month later ordered his deportation. *Nor is such act of admission equivalent to a certificate of status or residence issued in accordance with the provisions of some treaty or statute.* Such a certificate imports at least

> prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect. Liu Hop Fong vs. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888."

In the case of Lui Hit Chu vs. Plummer, 238 Fed. p. 763, his Honor, Judge Gilbert refers to a merchant certificate (Section 6 certificate) as being made in conformity with the treaty and recognizes that these certificates are entitled to weight as evidence.

In the case of Lew Suen Wo vs. United States, 184 Fed. 685, the distinction is noted in the language following:

> "Nor is the certificate of identity which was issued to the appellant after the commissioner of immigration had passed upon his right to admission, an instrument of such effect as to stand in the way of his deportation. It is not like the certificate of residence provided for in the act of 1893, which defined the method by which Chinese in the United States might obtain evidence of their right to remain. Those certificates were registered as the solemn act of the government, and were intended to furnish evidence of the right of the holders thereof to remain in the United States, and to be conclusive evidence of that right, and they are not subject to collateral attack. In re See Ho How (D.C.) 101 Fed. 115; in re Tom Hon (D.C.) 149 Fed. 842."

The certificate of identity, however, is given not under a treaty and not under the law of 1893 passed to comply with the treaty with China relating to the rights of persons then resident here upon obtaining a certificate of residence, but is issued by the Commissioner at the port of entry for the purpose of identifying the applicant with his landing record and to furnish him a ready means of identity for his convenience and for the convenience of the Immigration authorities. As was said in Lou Hop vs. U. S., 257 Fed. 489, in the note at page 492 thereof, "That certificate (the certificate of identity) unlike the certificate issued by the Viceroy and viseed by the American Consul General is, as we have seen, a Departmental Regulation and designed as a measure of convenience. (Sibray vs. U. S., 227 Fed. p. 4) and, of course, can be effective only so far as is within the law, citing:

U. S. vs. Lou Chu, 214 Fed. 463.
In re Tam Chung, 223 Fed. 801."

A case that disposes of the contentions of appellant here respecting the weight to be given the certificate and the significance of prior admissions of the father, Lee Hing, is found in Doo Fook vs. U. S., 272 Fed. p. 860, a Circuit Court of Appeals case in which his Honor, Judge Morrow wrote the opinion. That was a deportation case and there the appellant had been admitted as a native, and, thereafter his deportation was sought as being an alien unlawfully in the country. No additional evidence was introduced by the Government to that which

had been introduced at the hearing before the officials who admitted him, and notwithstanding the fact that as a matter of law it was there held that the burden was upon the Government to attack the right of a resident Chinese person who had been readmitted as a native born citizen to remain in the country, it was there held that that does not mean that the Government must in any event introduce evidence to show that the defendant is not a citizen of the United States. The attack may be made upon the evidence produced on behalf of the defendant on the hearing and if that evidence is contradictory or insufficient to show that the defendant was born in the United States the Court would be justified in so holding, notwithstanding the previous action of the Executive Department of the Government in giving him a landing.

A case, similar to the essential principles involved, was that of White vs. Chan Wy Sheung, 270 Fed. 764, in which this Court said:

> "It remains to be considered whether the judgment of the court below is sustainable on the ground on which it was based, that the department should be bound by its own prior adjudication in admitting the appellee's father and his two brothers as citizens of the United States. The board of immigration is not a court. It is an instrument of the executive power, and its decisions do not in a technical sense constitute res adjudicata, (Pearson vs. Williams, 202 U. S. 281, 285, 26 Sup. Ct. 608; 50 L. Ed. 1029), and the department is not

bound by its prior decisions admitting aliens to the United States. (Haw Moy v. North, 133 Fed. 89, 105 C. C. A. 381; Lew Quen Wo vs. United States, 184 Fed. 685; 106 C. C. A. 639; Li Sing vs. United States, 180 U. S. 486; 21 Sup. Ct. 449, 45 L. Ed. 634). We are unable to see how any principle of estoppel can apply in favor of the appellee from the fact that his father and two brothers were admitted to the United States as citizens thereof. The appellee was in no sense a party to the proceedings in which those decisions were made, and he was not represented therein. His right to enter depends solely upon the question whether his father was born in the United States. On his application for admission that question was determined adversely to him."

It is therefore respectfully urged that the fact that Lee Hing was twice admitted as a citizen and obtained a certificate of identity as one admitted as a citizen, that such facts did not estop the Immigration authorities in the case of Lee Soo (not a party to the prior hearings) from finding that Lee Hing was not in fact a citizen; nor did the existence of the facts above narrated relieve Lee Soo from the burden of establishing his claim of citizenship.

So much for the evidence; as stated by the District Judge, substantial conflict existed on an essential feature of the applicant's case, and this being so, the matter was one for the determination of the Board and their finding was not subject to review by the Court.

[redacted] vs. United States, 142 U. S. 651.
Kwock Jan Fat vs. White, 253 U. S. 456.

From the entire record before the Immigration authorities, it appears that Lee Hing, the father of the applicant, is not the Lee Hing known as No. 162 Steamer Belgic 1898, landed in 1899, and no other proof being offered to sustain the claim of citizenship, (it being conceded that applicant was given an opportunity to fully present his evidence, (appellant's brief, p. 12) the finding of the Immigration authorities that the evidence was insufficient to sustain the claim of Lee Soo to citizenship by virtue of his father's claim thereto, was fully supported by the evidence and cannot be judicially attacked.

PROPOSITION II.

The question of Lee Soo's citizenship is properly determinable by the Immigration authorities.

On this question the decisions of the courts are all one way. It has been settled that the determination of all questions of fact *relating to the right of entry* of Chinese applying therefor (including a claim of citizenship) has been vested by Congress in the Immigration authorities.

In the case of the United States vs. Ju Toy, 198 U. S. 253, the Supreme Court said:

> "It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicile and the belonging to a class excepted from the exclusion acts."

While the statutes of the United States limit the determination of the immigration officers to the case of aliens seeking entry, as was said in the case of United States vs. Sing Tuck, 194 U. S. 161, "in order to act at all the executive officials must decide the question of citizenship."

Again referring to the Ju Toy case (supra) it was said:

> "The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction, and kept there while his right to enter was under debate. If, for the purpose of argument, we assume that the Fifth amendment applies to him, and that to deny entrance to a citizen is to deprive him of liberty, we nevertheless are of opinion that with regard to him due process of law does not require judicial trial. That is the result of the cases which we have cited and the almost necessary result of the power of Congress to pass exclusion laws."

This doctrine is confirmed in the case of Tang Tun vs. Edsell, 223 U. S. 673.

To support his contention counsel depends on the decision of the Supreme Court in the case of Ng Fung Ho et al. vs. White, 259 U. S. 276.

His Honor, Judge Van Fleet, in his opinion in the instant case, found on this point as follows:

> "Nor does the fact that the petitioner's alleged right of admission is based upon his claim

> of citizenship entitle him, in such an instance as the present, to a judicial determination of that claim before he may be deported. While one lawfully within the United States, claiming to be a citizen thereof may not competently be deprived of his right to be here by mere executive order, but is entitled to have the question of his asserted citizenship judicially determined before he may be removed (*Ng Fung Ho vs. White, 259 U. S. 276*) no such right attaches to one who, like the petitioner is seeking admission to the country for the first time and the fact that his claim to admission may be based upon the asserted right of citizenship does not bring him within the category of those entitled to invoke the jurisdiction of our courts for the determination of that question. (United States vs. Ju Toy, 198 U. S. 253; Tang Tun vs. Edsell, 223 U. S. 673). *The distinction is between the case of one lawfully within our borders defending his asserted right to remain, and one who, like petitioner, is in legal contemplation without our borders seeking to get in.*" Ex parte Lee Soo, 291 Fed. 271.)

The Ng Fung Ho decision (supra), adverting to the security of judicial over administrative proceedings, held that a Chinese within the United States who sets up a claim to citizenship and "makes a showing that his claim is not frivolous," is entitled to a judicial hearing, but the decision makes clear the distinction between the case of resident Chinese and one seeking entry, as follows:

> "If, at the time of the arrest, they had been,

> in legal contemplation, without the borders of the United States, seeking entry the mere fact that they claim to be citizens would not have entitled them under the Constitution to a judicial hearing."

Further enunciation of this doctrine is to be found in the recent case of Soo Hoo vs. Tod, Commissioner of Immigration, 293 Fed. 689; also case of White vs. Chan Wy Sheung, supra.

In the case of Fong Yuen Ting vs. United States, 149 U. S. 711, the Supreme Court said:

> "The constitutional guaranty secured to a person while within the jurisdiction of the United States, whether they be resident aliens or citizens, has no application when the alien has voluntarily gone from the country. The constitutional guaranties are not extended to those outside of the jurisdiction of the United States."

Thus from the well settled law in this matter, it is apparent that the determination of Lee Soo's citizenship is within the jurisdiction of the immigration authorities.

Concluding, therefore, we respectfully submit that the Immigration authorities had jurisdiction to determine the citizenship of Lee Soo, a person of Chinese birth seeking admission to this country; that their finding that Lee Soo is an alien finds adequate support in the evidence. As these are the only points urged on this appeal, it is respectfully

submitted that the appeal is without merit and the judgment of the lower Court should be sustained.

Respectfully submitted,

JOHN T. WILLIAMS,
United States Attorney.

ALMA M. MYERS,
Asst. United States Attorney.

Dated: January 8, 1924.